

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.101 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

VARELI TEXTILE INDUSTRIES - Applicant(s)

Versus

COMMISSIONER OF INCOME-TAX - Respondent(s)

Appearance :

MR JP SHAH for Applicant(s) : 1,

MR MANISH J SHAH for Applicant(s) : 1,

MR MANISH R BHATT for Respondent(s) : 1,

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 06/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench 'B', has raised the following four questions at the instance of the assessee arising out of Income Tax Appeal Nos.5451/Ahd/89 : R.A. No.579/AHD/1994:

1. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that share issue expenses of Rs.8,31,384/- is capital expenditure and is not business expenditure ?
 2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the fees paid to the Registrar of Companies for increasing the share capital of the company is capital expenditure and, therefore, not allowable u/s. 37(1) of the I.T. Act, 1961 ?
 3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the prospectus report fee of Rs.3,000/- for new issue of shares is capital expenditure and, therefore, not allowable u/s.37(1) of the I.T. Act, 1961 ?
 4. Whether, on the facts and in the circumstances of the case, the amalgamation expenses of Rs.22,500/- and liquidation expenses of winding up of Starlight Silk Mills Pvt. Ltd. of Rs.15,000/- are capital expenditure and, therefore, not allowable u/s.37(1) of the I.T. Act, 1961 ?"
2. The Tribunal has also referred one more question arising out
- Cross Objection No.587/Ahd/1993 which is as follows:

R.A. No.580/AHD/1994:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in not condoning the delay for submission of the cross-objection and in further holding that such a ground cannot be raised for the first time before the Tribunal in the form of a belated cross-objection in respect of a point which was admittedly not the subject matter of assessment order passed by the Assessing Officer nor it was the subject matter of appeal decided by the CIT (A) ?"

3. It is an admitted position between the parties that four questions arising out of appeal stand concluded by decisions of the Apex Court and hence, it is not necessary to set out the facts and contentions in detail.
4. Question No.1 stands answered in favour of the revenue and against the assessee in light of ratio of Apex Court decision in case of Brooke Bond India Ltd. Vs. Commissioner of Income-tax, [1997] 225 ITR 798 (S.C.). The same is the position in relation to question Nos.2 and 3. Accordingly, question Nos.1, 2 and 3 are answered in the affirmative i.e. in favour of the revenue and against the assessee.
5. In so far as question No.4 is concerned, the same stands answered in favour of the assessee and against the revenue in light of ratio laid down by the Apex Court judgment in the case of Commissioner of Income-tax Vs. Bombay Dyeing and Manufacturing Co. Ltd., [1996] 219 ITR 521 (S.C.).
6. In so far as question arising out of cross objection filed by the assessee is concerned, the same is in two parts. The first part is whether the Tribunal was right in law in not condoning the delay in submission of cross-objection and second part is

whether the Tribunal was right in holding that the ground raised in cross-objection cannot be raised for the first time before the Tribunal in the cross-objection in respect of a point which was admittedly not the subject matter of assessment order nor was it subject matter of appeal decided by the Commissioner (Appeals). The Assessment Year is 1977-78 and the accounting period is the year ended on 31st March, 1977.

7. In relation to grounds of cross-objection and the affidavit in support of the application for condonation of delay, the Tribunal has recorded:

“The respondent herein prays that it be permitted to take the following ground as its cross objection:

1. “Rs.38,05,368/- on account of custom duty included in closing stock of amalgamating companies be excluded because it is not taxable income as per the important principle laid down by the Supreme Court in the case of Saraswati Industrial Syndicate Ltd. (186 ITR 278) that if assessee had changed on account of any circumstances, the benefit received by the earlier assessee could not be taken as income in the hands of the successor-assessee.”
2. The assessee was recently advised that the above Supreme Court decision was not available either when the assessee filed the return, the assessment order came to be passed or when the appeal was filed or when

the appeal was decided on 26.07.1989. The decision was delivered on 4th September, 1990 and came to be reported in last volume of 1990 being 186 ITR. It is this decision which is at the basis of this cross objection. When in third week of December starting with 13th instant the assessee sent the papers to its advocate Shri J.P. Shah the above decision was brought to its notice by him as applicable to the matter and consequently the assessee decided to take this additional ground. In the premises aforesaid, the assessee most humbly prays that the delay in filing the cross objection be kindly condoned."

The assessee also submitted an affidavit dated 6.1.1994 explaining the delay in submission of the C.O. It has been mentioned therein that the C.O. has been submitted on the basis of a subsequent decision of the Hon'ble Supreme Court in the case of Saraswati Industrial Syndicate Ltd., reported in 186 ITR 278. Since this judgment was delivered on 4th September, 1990 and came to be reported in last volume of 1990, being 186 ITR the suggestion of filling such a C.O. came from Shri J.P. Shah, Advocate and ultimately it was filed on 20.12.93."

8. The Tribunal found that the cross-objections were filed on 20th December, 1993 and hence, cross-objections were belated by a period of one year and eleven months. The Tribunal came to the conclusion that no sufficient cause has been made out explaining the delay and hence, the same could not be condoned.

9. Assailing the aforesaid order of the Tribunal it was submitted by Mr.Shah that in light of the following decisions of the Apex Court the Tribunal was in error and the delay was required to be condoned in the circumstances - (i) Nand Kishore Vs. State of Punjab, [1995] 6 SCC 614; (ii) N. Balakrishnan Vs. M. Krishnamurthy, [1998] 7 SCC 123; and (iii) Haryana Financial Corporation & Anr. Vs. Jagdamba Oil Mills & Anr., [2002] 3 SCC 496.

In relation to second part of the question Mr.Shah placed reliance on the Apex Court decision in case of National Thermal Power Co. Ltd. Vs. Commissioner of Income-tax, [1998] 229 ITR 383 (S.C.) to submit that the Tribunal had committed an error in holding that the assessee could not raise the issue for the first time before the Tribunal. He also invited attention to the computation portion of the assessment order to submit that the issue was very much before the Assessing Officer viz. the custom duty amount to Rs.38,05,368/- was added back as per statement of income accompanying the return of income and hence, the Tribunal was incorrect when it recorded that no claim was made before the Assessing Officer. He accepted the fact that before the Commissioner (Appeals) the assessee had not

raised the said issue.

10. As can be seen from the facts of the case by virtue of a scheme of amalgamation sanctioned by this Court on 7th August, 1986 M/s. Starlight Silk Mills Pvt. Ltd. amalgamated with the assessee-company. It appears that the said company had paid custom duty to the extent of Rs.38,05,368/- and claimed deduction under Section 43B of the Act while including the same in the purchase price and thereafter in the closing stock. The assessee had added back the same in its return of income as disallowable under Section 43B of the Act. The facts are not clear as to how the same was disallowable under Section 43B of the Act in the hands of the assessee.
11. However, what is more material is whether the Tribunal was justified in refusing to condone the delay for filing cross-objection beyond the statutory period of limitation. There is no dispute as to the propositions laid down by the Apex Court in relation to condonation of delay. It is equally well settled that where a cause is consciously abandoned (as in the present case) the party seeking condonation has to show by cogent evidence sufficient cause in support of its claim of condonation. The onus is greater. One of the propositions of settled legal position is to ensure that a meritorious case is not thrown out on the ground of limitation. Therefore, it is

necessary to examine, at least prima facie, whether the assessee has or has not a case on merits.

12. As can be seen from the grounds of cross-objection the assessee placed reliance on the Apex Court decision in case of Saraswati Industrial Syndicate Ltd. Vs. Commissioner of Income-tax, [1990] 186 ITR 278 in support of the proposition that it was entitled to the relief that it sought on the basis of being a different assessee. The learned advocate for the applicant apart from stating that the amalgamating company and the amalgamated company are two separate entities and in case of amalgamation, provisions of Section 41(1) of the Act cannot be invoked, has not been able to show how and in what circumstances the said section has been invoked and applied to the facts of the case. Admittedly, M/s. Starlight claimed deduction of custom duty actually paid by M/s. Starlight, but there is nothing on record to show that the assessee has in any manner received any amount in respect of such expenditure in cash or in any other manner whatsoever; nor is it shown that any benefit in respect of such custom duty by way of remission or cessation thereof has been received by the assessee. Therefore, the assessee cannot seek to support its case for condonation of delay on the basis of the Supreme Court decision in case of Saraswati Industrial Syndicate Ltd. (supra) as, prima facie, the assessee

failed to point out, in any manner whatsoever, as to how Section 41(1) of the Act is applicable, and that in fact the said provision has been invoked and applied in case of the assessee. Therefore, in absence of any prima facie case being made out it is not possible to accept on facts of the case that the assessee has a meritorious case which is not being considered by the Tribunal on the ground of limitation. In fact the learned counsel was not in a position to state what were the basic facts to which ratio of the Apex Court decision in case of Saraswati Industrial Syndicate Ltd. (supra) had to be applied. As the said decision is the plank on which the plea of sufficient cause is built it cannot be stated that the Tribunal committed any error in refusing to condone the delay.

13. Furthermore, on facts the Tribunal has found that the Apex Court decision in case of Saraswati Industrial Syndicate Ltd. was delivered on September 04, 1990 while the cross-objection was filed on 20th December, 1993. Therefore, counting the period of limitation from the point of time of the service of the appeal memorandum of departmental appeal on the assessee the Tribunal has found that there was delay of one year and eleven months which remained unexplained. Though it is not necessary to explain each day's delay yet,

the explanation has to be a reasonable one. In the present case the finding is : there is no cause. There is no material on record to hold otherwise.

14. In the aforesaid circumstances, it is not possible to find any infirmity in the impugned order of the Tribunal on the count of condonation of delay. Therefore, first part of the aforesaid question requires to be answered in the affirmative i.e. the Tribunal was right in law in not condoning the delay in filing the cross-objection i.e. in favour of the revenue and against the assessee. In light of the answer to the first part it is not necessary to answer the second part of the question and the same is left unanswered.

15. In the result, the reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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